Supreme Court, U. S.
FILED
AUG 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-289

GLENN B. BAVOUSETT,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JIM CLAUNCH
408 Sinclair Building
Fort Worth, Texas 76102
335-4003

ATTORNEY FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO.

GLENN B. BAVOUSETT,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Glenn B. Bavousett, the Petitioner herein, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on the 18th day of May, 1977. Petitioner's motion for rehearing and for rehearing en banc was denied on July 20, 1977. (See Appendix "C").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix A hereto, infra pp. A-1 - A-9. A corrected opinion was received on August 5, 1977 (Appendix E).

JURISDICTION

The judgment of the Court of Appeals was entered on the 18th day of May, 1977. The jurisdiction of this Court is involved under 28 U.S.C. 1254 (1). (See Appendix "D").

QUESTIONS PRESENTED

Does the loss of evidence through no fault of Defendant during a long pre-indictment delay after the Federal Bureau of Investigation has begun its investigation and during a time when the Federal Bureau of Investigation has access to the evidence and has knowledge of the existence of the records and knows the need for preserving them, to wit: company business records in regard to a government contract, and at a time when this Defendant did not have access or control of the records deprive the Defendant of a fair trial and due process of law under the Fifth Amendment to the Constitution of the United States of America?

Did the Court err in admitting into evidence certain exhibits variously referred to as computer runs or print-outs as summaries of other evidence prepared by the Federal Bureau of Investigation which were encumbered by powerfully prejudicial "conclusionary captions" such as "original false", "falsified difference" and "false money", thereby depriving the Defendant of a fair trial and due process of law under the Fifth

Amendment to the United States Constitution when the conclusions were an essential element of the indictment and charge against the Defendant to be proved beyond a reasonable doubt?

Did the closing argument of the United States Attorney which was to the effect that the "jury's tax money was being kicked in here and somebody should be held responsible" deprive the Defendant of due process and a fair trial under the Fifth Amendment to the Constitution of the United States of America?

CONSTITUTIONAL QUESTION

The due process of the Fifth Amendment to the Constitution is involved in this case:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

Defendant, Glenn B. Bavousett, was an employee and officer of N.H.A., Inc. a Texas Corporation, that had two contracts in regard to technical publications with the United States Army Aviation Material Command of the United States Department

of Defense.

The indictment was alleged in eight counts. The first count was conspiracy and the other seven counts alleged the filing of false claims against the United States Government, and aiding or abetting under Title 18, United States Code, Sections 286, 287 and 2.

The indictment was filed August 7, 1975. The alleged events referred to in the indictment occurred between September 1967 and November 1970. The Federal Bureau of Investigation began its investigation in October of 1971.

Evidence had been presented to a Grand Jury concerning the alleged crime as early as 1972. Some of the business records of N.H.A., Inc. were lost or destroyed in 1973 or 1974. This was long after the Defendant had ceased to be an employee or officer of N.H.A., Inc. It was also long after the F.B.I. had been investigating the case. The Federal Bureau of Investigation knew of the importance of the business records and did not take the necessary steps to preserve them.

Trial began March 22, 1976 in the United States District Court for the Northern District of Texas, Fort Worth Division. On April 1, 1976 the jury returned its verdict of guilty on all eight counts of the indictment.

During the trial, the Court admitted into evidence over the Defendant's objections summaries prepared by the F.B.I. which contained conclusionary statements such as "falsified difference" and "false money".

Defendant further objected to the closing argument of the United States Attorney to the effect that the jury's tax money was being "kicked in here", and somebody should be held responsible.

REASONS FOR GRANTING THE WRIT

ISSUE NUMBER ONE

The United States Court of Appeals for the Fifth Circuit incorrectly applied the law set forth in *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L. Ed. 2d 468 (1971). The *Marion case* is the leading case on pre-indictment delay. The interpretation of that case by the various Courts of Appeals and in particular by the Fifth Circuit in this case shows that there is a misunderstanding by the Courts of the law as set forth in *Marion.*

The Fifth Circuit Court of Appeals has applied an incorrect standard in the application of the *Marion* case and the effect of the pre-indictment delay on this Defendant.

The following cases show the need for clarification of the rules of pre-indictment delay as set forth in *United States v. Marion*, infra.

United States v. Barket, 530 F.2d 189 (8th Cir. 1976). The Court recognizes that whether or not *Marion* requires conjunctive showing in a pre-indictment delay of (1) substantial prejudice to the Defendant (2) governmental misconduct in the form of a tactical delay, is unsettled.

Other cases which discuss the uncertainty of the standards set forth in *Marion* are: *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976); *Gravitt v. United States*, 533 F.2d 1211.

The law regarding pre-indictment delay as it now exists is vague and uncertain and is of great concern, not only to this Defendant, but to all the people of the United States as a part of the law of the United States in providing due process under

the Fifth Amendment to the Constitution of the United States of America.

The pre-indictment delay in this case was so severe that the loss of the evidence through no fault of the Defendant substantially impaired the Defendant's ability to defend himself. *United States v. Golden*, 436 F.2d 941 (1971) (8th Cir.); *United States v. Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L. Ed. 627 (1966).

The Government could have preserved the evidence and knew of its importance, but failed to do so. This Defendant did not have access to the records after he left the Company and could not preserve the records.

Other cases supporting this Defendant's position are *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972) and *United States v. Stamp*, 458 F.2d 759 (U.S. App. D.C.).

ISSUE NUMBER TWO

The writ should also be granted in this case because of the jury arguments made by the prosecutor which argument the United States Court of Appeals for the Fifth Circuit held to be "highly improper and an appeal to the passion and prejudices of the jurors". The Defendant has been denied due process under the Fifth Amendment to the Constitution of the United States and *Berger v. United States*, 295 U.S. 78, and *Hanford v. United States*, 249 F.2d 295 have been misapplied to this Defendant. Proper guidelines for jury argument are of great importance to all Defendants in the administration of the criminal law system of the United States.

ISSUE NUMBER THREE

In its corrected opinion (Appendix E), the Panel of Fifth Circuit Court of Appeals relies upon Rule 1006 of the Federal Rules of Evidence in regard to the admission of summaries and the labels thereon.

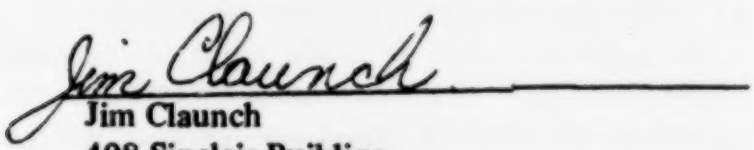
The basic premise to Rule 1006 is that . . . "The original, or duplicates shall be made available for examination and or copying . . ." This was impossible to do in this case because a part of the records had been destroyed as set out in the first point of this petition. This contention has been asserted throughout the trial that the lost records denied this Defendant a fair trial.

Rule 1006 certainly does not state anywhere that the F.B.I. or any member of the prosecution may offer into evidence conclusionary statements that could not be testified about from the stand. Certainly the Court would not permit a member of the F.B.I. to testify that in his opinion this is "false data", yet in admitting into evidence the conclusionary statements the Court has done the same thing. The admission of these summaries with the conclusions thereon deprived this Defendant of a fair trial under the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Jim Claunch
408 Sinclair Building
Fort Worth, Texas 76102

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Jim Claunch, attorney for the Petitioner, Glenn B. Bavousett, and a member of the Bar of the State of Texas having made application to be admitted to the Bar for the United States Supreme Court, hereby certify that on this the 19th day of August, 1977, I served three copies of the foregoing Petition for Writ of Certiorari on each of the following offices:

1. Mr. John Sweeney and Mr. Gehard Kleindschmidt, Assistant United States Attorneys for the Northern District of Texas, by mailing them three copies of the same at their office, Federal Courthouse Building, Fort Worth, Texas.

2. On the United States by mailing three copies thereof in a duly addressed envelope, to the Honorable Robert H. Bork, United States Solicitor General, United States Department of Justice, Washington, D.C.

Jim Claunch

JIM CLAUNCH

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-2314

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

LEWIS MILLER SMYTH, III, and GLENN B. BAVOUSETT,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

May 18, 1977

Before GODBOLD, TJOFLAT and HILL,
Circuit Judges

TJOFLAT, Circuit Judge:

Appellants Lewis Smyth and Glenn Bavousett are former officers of Norman Harwell Associates, Inc. (NHA), a corpora-

tion engaged in the preparation and publication of technical materials. They were charged in an eight count indictment with conspiring to defraud [1] and with defrauding [2] the United States by overbilling the United States Army Aviation Material Command (AVSCOM) on two cost-plus contracts [3] which NHA had with AVSCOM. The overbilling was allegedly done intentionally by appellants and other officers and employees of NHA who systematically replaced the company's original employee labor distribution cards with a set of forged cards on which time formerly billed by NHA to private clients was shown as having been spent on AVSCOM work. The appellants were tried and convicted along with other participants in the scheme and sentenced to concurrent five-year terms of imprisonment on each count.

On appeal appellants' principal arguments are (1) that the lengthy pre-indictment delay denied them due process, (2) that the lower court erred in admitting into evidence certain FBI computer printouts, and (3) that the prosecutor's closing argument was improper and denied them a fair trial. [4] We reject each of these arguments and affirm.

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[1] 18 U.S.C. § 286 (1970).

[2] Id. 287

[3] Under the contracts NHA agreed to develop, write and deliver certain technical manuals to AVSCOM at an agreed composite billing rate for each type of employee who worked on the contracts. The rate was designed to include labor, overhead and profit. Thus NHA was required to keep track of the time employees spent on AVSCOM work and then to bill AVSCOM at the composit rate for the total hours.

[4] Appellants also question the sufficiency of the evidence, the trial court's failure to grant their severance motions, the FBI's refusal to discuss the case with them, and certain jury instructions. We have examined each of these claims of error and find them to be totally without merit.

I. Pre-Indictment Delay

The indictment was returned on August 7, 1975. In Count I it charged a conspiracy running from June 28, 1968, through September 15, 1971, while Counts II through VIII charged substantive offenses based on false billings during 1970. (These false billings constituted some of the overt acts specified in the conspiracy count.) Thus, there was a period of three years and ten months between the termination of the conspiracy (the most recent offense) and the return of the indictment. Though they concede that the indictment was returned well within the five-year statute of limitations period, 5/ appellants claim that under *United States v. Marion*, 404 U.S. 307, 320-21, 92 S.Ct. 455, 463, 30 L.Ed.2d 468, 478-79 (1971), the indictment should nonetheless have been dismissed because the delay substantially prejudiced their right to a fair trial. The prejudice is said to have resulted from the accidental destruction of NHA employees of certain corporate records in 1973, including certain computer printouts, which appellants claim might have demonstrated that the AVSCOM billings were not inflated. 6/ While it is admitted that the Government did not destroy these records, appellants argue that the Government knew of the records' existence and importance and thus was negligent in failing to insure their safe keeping.

We reject this argument for two reasons. First, the law identifies two factors which must be considered in evaluating

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5/ Id. § 3282

6/ The appellants and the other officers and employees of NHA who were involved in the fraudulent billing scheme left NHA in 1971 and were thus not involved in the subsequent destruction of the records. The records were simply thrown out to provide needed working space, and the NHA employees in charge were under the impression that the records were no longer important.

a complaint of pre-indictment delay: (1) that defendant incurred substantial prejudice as a result of the government's delay, and (2) that the prosecution had intentionally employed the delay to gain a tactical advantage. *United States v. Avalos*, 541 F.2d 1100, 1107 (5th Cir. 1976). See also *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976); *United States v. Butts*, 524 F.2d 975 (5th Cir. 1975). But see *Gravitt v. United States*, 523 F.2d 1211, 1216, (5th Cir. 1975) ("negligence is counted against the government but is weighted less heavily"). There has not even been an allegation here that the delay was "an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 320-21, 92 S.Ct. at 463, 30 L.Ed.2d at 478-79. The record clearly shows that, while the Government investigation of NHA began in 1971, it was not until April 1975 that a witness came forward and related to investigators how the fraud was perpetrated. Prior to that time the FBI knew that NHA's records had been tampered with but did not know who the culprits were. Thus, the delay in the present case was in no way related to any Government misfeasance.7/

Second, even if the Government had been responsible for the pre-indictment delay, we believe that appellants have failed to show substantial prejudice. The fact is that, while appellants claim the missing records would have exonerated them, their proffer failed to support their contention. Indeed, the record indicates that all the pertinent records were before the court. The original set of employee time cards and the forged set were placed in evidence, as were the computer runs which tied the forged set of cards into the vouchers presented to AVSCOM.

7/ Appellants characterize the Government's conduct as negligent; however, the alleged negligence relates to the failure of investigators to seize the documents which were later destroyed. At no point did the appellants make a showing that the Government's negligence caused the pre-indictment delay.

These were the critical source materials, for they clearly demonstrated that someone copied the original cards submitted by the employees and changed them to show additional work being performed on AVSCOM contracts. They also established that AVSCOM was subsequently billed on the basis of these forged cards. Absent some explanation as to how the destroyed computer printouts could have placed an innocent light on the forged cards and the billings based on these cards, appellants' claim that they were prejudiced is speculative at best and clearly insufficient to demonstrate prejudice. See, e.g., *Butts*, 524 F.2d at 977; *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975).

II. The FBI Computer Printouts

At trial two sets of computer printouts prepared by the FBI were introduced into evidence by the Government. One set tabulated the information disclosed by the employee labor distribution cards - the originals and the forged cards - to show the discrepancies between them. Over each column of the first group of printouts was a heading, and the inside cover of the exhibit contained a key which explained the meaning of each heading. The key was as follows:

MEANING OF HEADINGS

LISTING HEADER	DESCRIPTION
Voucher Hours =	Billed by NHA per Voucher No Time Card Support
Worked Hours =	Original Time Taken From Time Cards

MEANING OF HEADINGS (Continued)

LISTING HEADER	DESCRIPTION
Billed Hours =	False Time Taken From Time Cards
Amount of Voucher =	Billed by NHA per Voucher No Time Card Support
AMOUNT FOR HOURS WORKED =	Original Cost Supported by Time Cards

The second set of printouts tabulated the information on the billings submitted to AVSCOM and cross-referenced this information to the original and forged employee labor distribution cards. The exhibit was designed to show as to each voucher how much time the Government was charged for in excess of the time actually spent on AVSCOM work. The printouts contained columns with the following headings: "original data," "falsified data," "falsified data summarized," and "difference between original/false."

Appellants objected to the use of the two sets of printouts on the ground that the column headings and the explanatory key constituted improper conclusions which invaded the province of the jury. The objection was overruled, and the exhibits were admitted. In charging the jury at the end of the trial, the court instructed that these computer printouts were not evidence and were only received as summaries of the labor distribution cards - original and forged - and the billings, which were in evidence. Appellants contend that this instruction failed to cure the error earlier committed in allowing the jury to be exposed to the conclusory matter appearing on the printouts.

It is well settled that it is within the trial court's discretion to admit summaries such as these computer printouts, as long as they are amply supported by the evidence and the jury is instructed that the summaries themselves are not evidence. See Fed. R. Evid. 1006. 8/ See also *United States v. Prevatt*, 526 F.2d 400, 404 (5th Cir. 1976); *United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975), cert. denied, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *United States v. Lawhon*, 499 F.2d 352, 357 (5th Cir. 1974), cert. denied, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 820 (1975). Diez, for example, involved a tax evasion prosecution in which the Government used illustrative charts and summaries in the presentation of its case. The captions on one chart read "schedule of Sales, Net Taxable Gains . . . And Amounts Not Reported Or Taxable Gain Reported By Others." Appellants complained that the captions were based on assumptions and infringed on the province of the jury. The Court rejected this argument:

> Any such chart of computations, however, must rest on certain assumptions. Contrary to defendant's argument, the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record . . . In this case it is indisputable that the assumptions on which the Government based its charts - that is, its version of the facts - were amply supported by evidence already presented to the jury.

8/ Rule 1006 provides:

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The Court may order that they be produced in court.

> The court should instruct the jury that "summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documents and detailed evidence already submitted." . . . In this case such instructions were given both when the Government's summary witness testified and again at the close of the case. We believe the court's instructions eliminated any possibility of the charts confusing the jury. 515 F.2d at 905-06 (citations and footnotes omitted)

Here the original and forged employee labor distribution cards were in evidence. The computer printouts merely tabulated the information on these cards. As for the headings, they explained the significance the Government attached to the tabulations. In this sense the headings reflected certain assumptions; however, the printouts and headings were amply supported by the evidence and were designed solely as a means to facilitate the jury's understanding of the evidence. Moreover, the jury was well aware that the printouts and headings were prepared by the Government for that purpose. The trial court was thus acting well within its authority when it admitted the exhibits.

III. The Prosecutor's Closing Argument

During his closing argument the prosecutor said: "You want to say we approve of this type of conduct in dealing with the Government? Let Uncle Sam take the ride, but when you think about that, think of that, that's your tax money, that's your tax money being kicked in here." Appellants submit that this argument was an improper attempt to appeal to the personal prejudices of the jurors as taxpayers and that it was so prejudicial they were denied a fair trial.

We view the prosecutor's pitch as an unprofessional and highly improper appeal to the passion and prejudices of the juror. See *Handford v. United States*, 249 F.2d 295 (5th Cir. 1957); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 5,8(c) (1972). But we must consider errors of this sort in the context of the entire record to determine whether or not the substantial rights of an accused were affected. See *Handford*, supra; Fed. R. Crim. P. 52(a). In the present case, the court sustained the objection and gave an appropriate cautionary instruction. 9/ More importantly, though, unlike the situation in *Handford*, this clearly was not a close case. The evidence against appellants was strong, and we are therefore convinced that the error was harmless.

AFFIRMED.

9/ The court instructed the jury as follows:

Members of the jury, you are not to consider that statement for the reason that it's a personal appeal to you. It's alright for him to argue that tax money is paying for it but [not] the portion about your tax money hurting you. It will not be considered by you because you're not supposed - you're supposed to view the matter impartially. Record at 1107-08.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

May 18, 1977

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

No. 76-2314 - U.S.A. VS. SMYTH, ET AL.

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly

demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Ann Barre
Deputy Clerk

enc.

cc: Mr. Jim Claunch
✓Mr. Charles Michael Mallin
Mr. Joseph A. Calamia
Mr. Woodrow Bean, Sr.
Mr. Gerhard E. Kleinschmidt
Mr. John W. Sweeney, Jr.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

July 20, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2314 - U.S.A. v. LEWIS MILLER SMYTH, III and GLENN B. BAVOUSETT

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

cc: Mr. Jim Claunch
Messrs. Charles Michael Mallin
Joseph A. Calamia
Mr. Woodrow Bean, Sr.
Messrs. Gerhard E. Kleinschmidt
Mr. John W. Sweeney, Jr.

APPENDIX "D"

§ 286. Conspiracy to defraud the Government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
June 25, 1948, c. 645, 62 Stat. 698.

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
June 25, 1948, c. 645, 62 Stat. 698.

APPENDIX "E"

CORRECTED OPINION

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lewis Miller SMYTH, III and Glenn B. Bavousett,
Defendants-Appellants.

No. 76-2314.

United States Court of Appeals,
Fifth Circuit.

May 18, 1977.

Rehearing and Rehearing En Banc
Denied July 20, 1977.

Defendants were convicted in the United States District Court for the Northern District of Texas at Fort Worth, Eldon B. Mahon, J., of conspiring to defraud and with defrauding the United States by overbilling government agency on two cost plus contracts and they appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that (1) preindictment delay of three years and ten months between termination of conspiracy and return of the indictment did not prejudice defendants' rights to a fair trial where the delay was not related to any government misfeasance and defendants failed to support their contention that corporate records that had been accidentally destroyed would have exonerated them; (2) admission of FBI

computer printouts together with underlying documents, with instruction that summaries were not evidence, was within court's discretion; (3) prosecutor's closing argument that tax money was involved was unprofessional and improper but was harmless where evidence against defendant was strong.

Affirmed.

1. Indictment and Information Key 7

Factors which must be considered in evaluating complaint of preindictment delay are that defendant incurred substantial prejudice and that prosecution intentionally employed the delay to gain a tactical advantage.

2. Indictment and Information Key 7

Preindictment delay of three years and ten months between termination of conspiracy to defraud the United States by overbilling government agency on cost-plus contracts did not prejudice defendants' right to a fair trial where delay was not related to any government misfeasance and defendants failed to support contention that corporate records that had been accidentally destroyed would have exonerated them. 18 U.S.C.A. §§ 286, 287, 3282.

3. Criminal Law Key 432

Rule of evidence treats summaries as evidence under circumstances where, in the court's discretion, examination of the underlying documents in a trial setting cannot be done conveniently. Federal Rules of Evidence, rule 1006, 28 U.S.C.A.

4. Criminal Law Key 429(1)

Trial court did not err in admitting FBI computer printouts where court admitted the underlying documents and instructed jury that summaries were not evidence. Federal Rules of Evidence, rule 1006, 28 U.S.C.A.

5. Criminal Law Key 432

Inasmuch as summaries are elevated under rule of evidence to the position of evidence, care must be taken to omit argumentative matters in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes. Federal Rules of Evidence, rule 1006, 28 U.S.C.A.

6. Criminal Law Key 632

Framers of rule of evidence providing for admission of summaries contemplated a pretrial resolution of any issues that may be raised concerning the use of summaries. Federal Rules of Evidence, rule 1006, 28 U.S.C.A.

7. Criminal Law Key 713

Court will consider errors regarding improper closing argument in the context of the entire record to determine whether the substantial rights of an accused were affected. Fed. Rules Crim. Proc. rule 52(a), 18 U.S.C.A.

8. Criminal Law Key 1171.1(3)

Prosecutor's closing argument in prosecution for conspiring to defraud and defrauding the United States by overbilling government agency on cost-plus contracts that tax money was involved, although unprofessional and improper, was harmless where court sustained objection and gave appropriate cautionary instruction and evidence against defendants was strong. 18 U.S.C.A. §§ 286, 287; Fed. Rules Crim. Proc. rule 52(a), 18 U.S.C.A.

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBOLD, TJOFLAT and HILL, Circuit Judges.

TJOFLAT, Circuit Judge:

Appellants Lewis Smyth and Glenn Bavousett are former officers of Norman Harwell Associates, Inc. (NHA), a corporation engaged in the preparation and publication of technical materials. They were charged in an eight count indictment with conspiring to defraud [1/] and with defrauding [2/] the United States by overbilling the United States Army Aviation Material Command (AVSCOM) on two cost-plus contracts [3/] which NHA had with AVSCOM. The overbilling was allegedly done intentionally by appellants and other officers and employees of NHA who systematically replaced the company's original employee labor distribution cards with a set of forged cards on which time formerly billed by NHA to private clients was shown as having been spent on AVSCOM work. The appellants were tried and convicted along with other participants in the scheme and sentenced to concurrent five-year terms of imprisonment on each count.

On appeal appellants' principal arguments are (1) that the

1/ 18 U.S.C. § 286 (1970).

2/ *Id.* § 287.

3/ Under the contracts NHA agreed to develop, write and deliver certain technical manuals to AVSCOM at an agreed composite billing rate for each type of employee who worked on the contracts. The rate was designed to include labor, overhead and profit. Thus NHA was required to keep track of the time employees spent on AVSCOM work and then to bill AVSCOM at the composite rate for the total hours.

lengthy pre-indictment delay denied them due process, (2) that the lower court erred in admitting into evidence certain FBI computer printouts, and (3) that the prosecutor's closing argument was improper and denied them a fair trial. [4] We reject each of these arguments and affirm.

I. Pre-Indictment Delay

The indictment was returned on August 7, 1975. In Count I it charged a conspiracy running from June 28, 1968, through September 15, 1971, while Counts II through VIII charged substantive offenses based on false billings during 1970. (These false billings constituted some of the overt acts specified in the conspiracy count.) Thus, there was a period of three years and ten months between the termination of the conspiracy (the most recent offense) and the return of the indictment. Though they concede that the indictment was returned well within the five-year statute of limitations period, [5] appellants claim that under *United States v. Marion*, 404 U.S. 307, 320-21, 92 S.Ct. 455, 463, 30 L.Ed.2d 468, 478-79 (1971), the indictment should nonetheless have been dismissed because the delay substantially prejudiced their right to a fair trial. The prejudice is said to have resulted from the accidental destruction by NHA employees of certain corporate records in 1973, including certain computer printouts, which appellants claim might have

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[4] Appellants also question the sufficiency of the evidence, the trial court's failure to grant their severance motions, the FBI's refusal to discuss the case with them, and certain jury instructions. We have examined each of these claims of error and find them to be totally without merit.

[5] *Id.* § 3282.

demonstrated that the AVSCOM billings were not inflated. 6/ While it is admitted that the Government did not destroy these records, appellants argue that the Government knew of the records' existence and importance and thus was negligent in failing to insure their safe keeping.

[1] We reject this argument for two reasons. First, the law identifies two factors which must be considered in evaluating a complaint of pre-indictment delay: (1) that defendant incurred substantial prejudice as a result of the government's delay, and (2) that the prosecution had intentionally employed the delay to gain a tactical advantage. *United States v. Avalos*, 541 F.2d 1100, 1107 (5th Cir. 1976). *See also United States v. Duke*, 527 F.2d 386 (5th Cir. 1976); *United States v. Butts*, 524 F.2d 975 (5th Cir. 1975). *But see Gravitt v. United States*, 523 F.2d 1211, 1216 (5th Cir. 1975) ("negligence is counted against the government but is weighted less heavily"). There has not even been an allegation here that the delay was "an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 324-25, 92 S.Ct. at 465, 30 L.Ed.2d at 478-79. The record clearly shows that, while the Government investigation of NHA began in 1971, it was not until April 1975 that a witness came forward and related to investigators how the fraud was perpetrated. Prior to that time the FBI knew that NHA's records had been tampered with but did not know who the culprits were. Thus, the delay in the present case was in no way

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6/ The appellants and the other officers and employees of NHA who were involved in the fraudulent billing scheme left NHA in 1971 and were thus not involved in the subsequent destruction of the records. The records were simply thrown out to provide needed working space, and the NHA employees in charge were under the impression that the records were no longer important.

related to any Government misfeasance.[7]

[2] Second, even if the Government had been responsible for the pre-indictment delay, we believe that appellants have failed to show substantial prejudice. The fact is that, while appellants claim the missing records would have exonerated them, their proffer failed to support their contention. Indeed, the record indicates that all the pertinent records were before the court. The original set of employee time cards and the forged set were placed in evidence, as were the computer runs which tied the forged set of cards into the vouchers presented to AVSCOM. These were the critical source materials, for they clearly demonstrated that someone copied the original cards submitted by the employees and changed them to show additional work being performed on AVSCOM contracts. They also established that AVSCOM was subsequently billed on the basis of these forged cards. Absent some explanation as to how the destroyed computer printouts could have placed an innocent light on the forged cards and the billings based on these cards, appellants' claim that they were prejudiced is speculative at best and clearly insufficient to demonstrate prejudice. *See, e.g., Butts,* 524 F.2d at 977; *United States v. McGough,* 510 F.2d 598, 604 (5th Cir. 1975).

II. The FBI Computer Printouts

At trial two sets of computer printouts prepared by the FBI were introduced into evidence by the Government. One set

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[7] Appellants characterize the Government's conduct as negligent; however, the alleged negligence relates to the failure of investigators to seize the documents which were later destroyed. At no point did the appellants make a showing that the Government's negligence caused the pre-indictment delay.

tabulated the information disclosed by the employee labor distribution cards - the originals and the forged cards - to show the discrepancies between them. Over each column of the first group of printouts was a heading, and the inside cover of the exhibit contained a key which explained the meaning of each heading. The key was as follows:

MEANING OF HEADINGS

LISTING HEADER	DESCRIPTION
Voucher Hours =	Billed by NHA per Voucher No Time Card Support
Worked Hours =	Original Time Taken From Time Cards
Billed Hours =	False Time Taken From Time Cards
Amount of Voucher =	Billed by NHA per Voucher No Time Card Support
Amount for Hours Worked =	Original Cost Supported by Time Cards

The second set of printouts tabulated the information on the billings submitted to AVSCOM and cross-referenced this information to the original and forged employee distribution cards. The exhibit was designed to show as to each voucher how much time the Government was charged for in excess of the time actually spent on AVSCOM work. The printouts contained columns with the following headings: "original data," "falsified data," "falsified data summarized," and "difference between original/false."

Appellants objected to the use of the two sets of printouts on the ground that the column headings and the explanatory key constituted improper conclusions which invaded the province of the jury. The objection was overruled, and the exhibits were admitted. In charging the jury at the end of the trial, the court instructed that these computer printouts were not evidence and were only received as summaries of the labor distribution cards - original and forged - and the billings, which were in evidence. Appellants contend that this instruction failed to cure the error earlier committed in allowing the jury to be exposed to the conclusory matter appearing on the printouts.

The evidentiary use of summaries at trial is controlled by Fed. R. of Evid. Rule 1006, which provides:

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. 8/

Prior to the adoption of Rule 1006 the law governing the evidentiary status of summaries and therefore their use was unsettled. Striking differences had developed within and among the circuits, no doubt causing the district courts to resort to various approaches in handling summaries at trial. In theory the scope of judicial treatment ranged from the view that summaries were not evidence, *see e.g., Conford v. United States,*

8/ The new Federal Rules of Evidence became effective on July 1, 1975, prior to the trial of this case.

336 F.2d 285, 288 (10th Cir. 1964), to the view that they were. *See e.g., Hartford Accident and Indemnity Co. v. Collins Dietz-Morris Co.*, 80 F.2d 441 (10th Cir. 1935). Among the opinions treating summaries as evidence the more liberal school required no underlying documents to be received in evidence as a foundation for the summaries. All that was required was that the underlying documents be made available to opposing counsel for cross-examination purposes. *See e.g., In re Shelley Furniture, Inc.*, 283 F.2d 540, 543 (7th Cir. 1960). The summaries were therefore given an independent evidentiary significance and could be introduced on the strength of the preparer's foundation testimony, thereby avoiding the need to receive voluminous documentary evidence at trial. 9/ Under

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9/ This approach is in keeping with liberal common law treatment of summaries espoused by Professor Wigmore:

> Where a fact could be ascertained only by the inspection of a large number of documents made up of very *numerous detailed statements* - as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank ledger - it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper.
>
> Most courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available . . .
> 4 Wigmore § 1230 (4th ed. 1950).

Wigmore's view was codified by Rule 1006. *See Rules of Evidence*, 56 F.R.D. 183, 345-46 (1972). (Advisory Committee's Note.)

the most restrictive view summaries were never accorded the position of evidence. Rather, they were treated as jury aids designed to clarify voluminous documentary evidence already in the record and to provide a manageable perspective for the jury in its deliberations. Juries were not permitted to see the summaries unless every fact reflected was established by evidence in the record. *See, e.g., United States v. Moody*, 339 F.2d 161 (6th Cir. 1964); *Hoyer v. United States*, 223 F.2d 134 (8th Cir. 1955).

One viewing the Fifth Circuit opinions cannot clearly ascertain its position regarding the status of such summaries either. This Court has sometimes followed the liberal view; on occasion it has followed the more restrictive view. *Compare Greenhill v. United States*, 298 F.2d 405 (5th Cir. 1962) *and New Amsterdam Casualty Co. v. W. D. Felder and Co.*, 214 F.2d 825 (5th Cir. 1954) *with United States v. Prevatt*, 526 F.2d 400, 404 (5th Cir. 1976) *and United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976).[10/]

10/ Prior to the implementation of the new Federal Rule this court's application of common law principles governing the reception of summaries as evidence varied. We have, for example, referred to such summaries as either "primary proof" or "secondary proof" in approving trial court treatment of summaries as evidence. *See McDaniel v. United States*, 343 F.2d 785, 789 (5th Cir.), *cert. denied*, 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965); *Azcona v. United States*, 257 F.2d 462 (5th Cir. 1958). At times we have required that the underlying source documents be in evidence before the summaries could properly be received. *McDaniel, supra*. We have also predicated admissibility on a mere showing that such underlying sources were made available for inspection by the opposing side. *Cooper v. United States*, 91 F.2d 195 (5th Cir. 1937); *New Amsterdam Cas. Co. v. W. D. Feldon & Co.*, 214 F.2d 825 (5th Cir. 1954). These variations in the treatment of summaries are manifested by the inconsistent references to them as either "competent evidence", *Ward. v. United States*, 356 F.2d 938 (5th Cir. 1966); *Barrick v. Pratt*, 32 F.2d 732 (5th

[3] Prior uncertainties regarding the status of summaries are now resolved by Rule 1006. Although the word "evidence" does not appear in its text we construe the rule as treating summaries as evidence under circumstances where, in the court's discretion, examination of the underlying documents in a trial setting cannot be done conveniently. This construction is compelled by the rule's history and by the fact that the rule requires only the *availability* of the underlying documents.

[4-6] That the court below did not apply the rule so as to receive the summaries in evidence is understandable in light of the conflicting case law. We are convinced, however, that under any application of Rule 1006 the use of these summaries at trial was not error. In applying the rule the trial court followed the most restrictive approach indicated in our prior opinions. This approach, from the appellants' perspective, was calculated to be the least prejudicial. The court could have excluded all of the underlying documents and received the summaries as evidence. The court chose, however, to admit these documents in evidence and to instruct the jury that the summaries were not

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10/ (Continued)

Cir. 1929), or useful tools through which a jury can more readily comprehend the underlying evidence. *United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *United States v. Lawhon*, 499 F.2d 352, 357 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 820 (1975). Through this disaccord we recently held that such summaries may be used only where the jury is instructed that the summaries themselves are *not* evidence. *See United States v. Prevatt*, 526 F.2d 400, 404 (5th Cir. 1976); *Diez, supra*; *Lawhon, supra*. *But see EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975).

evidence. 11/ Moreover, in light of appellants' objections to the characterizations the Government utilized in the summary headings the cautionary instruction given by the trial judge was entirely appropriate, if not necessary, for it neutralized their possible prejudicial effect. Thus, whether or not the trial court had received the summaries as evidence under Rule 1006, the cautionary instruction, insofar as it emphasized that the characterizations were not evidence, would have made the remainder of the summaries admissible under the rule. 12/

In fine, we reject appellants' claim that the district court's treatment of the summaries unduly prejudiced their trial. In permitting the jury to utilize them, the court proceeded well within the discretion accorded it under Rule 1006. The original and forged employee labor distribution cards were in evidence.

11/ Implicit in Rule 1006 is the notion that a trial judge may choose this alternative. In the circumstances of a given case the court may feel that the jury, or the court, itself, in a bench trial, ought to consider the source documents in resolving a fact issue and that, on balance, a summarization of such evidence would add to or detract from the proper weight or emphasis to be given it.

12/ We do not opine on the extent of error that would have been created had *these* summaries and characterizations been received as evidence without *any* cautionary instruction being given. It would seem, though, that because summaries are elevated under Rule 1006 to the position of evidence care must be taken to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes. *See Ping v. United States*, 407 F.2d 157, 160 (8th Cir.) *cert. denied*, 395 U.S. 926, 89 S.Ct. 1784, 23 L.Ed.2d 244 (1969); *Lloyd v. United States*, 226 F.2d 9, 17 (5th Cir. 1955). We think that the framers of the rule clearly contemplated a pre-trial resolution of any issues that may be raised concerning the use of summaries. By requiring that the underlying documents be made available to opposing counsel, the rule encourages counsel to eliminate objectionable matter and to stipulate to the form of the summary. Through this process the frequency of objections such as those raised here should be greatly reduced.

The computer printouts merely tabulated the information they disclosed. As for the headings, they accurately explained the significance the Government attached to the tabulations. In this sense the headings reflected certain assumptions, but these assumptions were amply supported by the evidence already before the jury. By instructing the jury that the summaries were not evidence, however, the trial judge took one further step to insure that the jury would not rely on the conclusory matter as independent proof of the appellants' guilt.

III. The Prosecutor's Closing Argument

During his closing argument the prosecutor said: "You want to say we approve of this type of conduct in dealing with the Government? Let Uncle Sam take the ride, but when you think about that, think of that, that's your tax money, that's your tax money being kicked in here." Appellants submit that this argument was an improper attempt to appeal to the personal prejudices of the jurors as taxpayers and that it was so prejudicial they were denied a fair trial.

[7, 8] We view the prosecutor's pitch as an unprofessional and highly improper appeal to the passion and prejudices of the juror. *See Handford v. United States*, 249 F.2d 295 (5th Cir. 1957); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 5.8(c) (1972). But we must consider errors of this sort in the context of the entire record to determine whether or not the substantial rights of an accused were affected. *See Handford, supra;* Fed. R. Crim. P. 52(a). In the present case, the court sustained the

objection and gave an appropriate cautionary instruction. 13/ More importantly, though, unlike the situation in *Handford*, this clearly was not a close case. The evidence against appellants was strong, and we are therefore convinced that the error was harmless.

AFFIRMED.

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13/ The court instructed the jury as follows:

> Members of the jury, are are not to consider that statement for the reason that it's a personal appeal to you. It's alright for him to argue that tax money is paying for it but [not] the portion about your tax money hurting you. It will not be considered by you because you're not supposed - you're supposed to view the matter impartially. Record at 1107-08.